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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. MH-20000209-8-10	2 CA-MH 2010-0005 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Honorable Amy Hubbell, Court Commissioner
Honorable Wayne Yehling, Court Commissioner

AFFIRMED

Barbara LaWall, Pima County Attorney
By Grant Winston
Tucson
Attorneys for Appellee

Ann L. Bowerman
Tucson
Attorney for Appellant

E C K E R S T R O M, Judge.

¶1 In this appeal, appellant challenges the trial court's order dated August 6, 2010, finding appellant is persistently or acutely disabled as a result of a mental disorder and in need of mental health treatment, ordering her committed for that purpose and requiring treatment pursuant to A.R.S. §§ 36-533 and 36-540. She contends the court abused its discretion or exceeded its jurisdiction by requiring her to remain hospitalized pending a discharge hearing and by "requiring [an] outpatient treatment plan when none was legally available." She also challenges the court's denial of her oral motion to dismiss the petition and release her from the hospital based on an alleged violation of A.R.S. § 36-3284(B)(3), claiming the mental health care power of attorney she had granted to her husband precluded the court from ordering involuntary commitment and treatment. We affirm for the reasons stated below.

¶2 On July 17, 2010, a Tucson police officer conducted a welfare check on appellant, took her to a mental health hospital, and filed an application for her emergency admission to a mental health facility for the purpose of evaluation. *See* A.R.S. § 36-524. He testified at the commitment hearing that he had been informed appellant had called 9-1-1 eleven times that day to report that her husband had been murdering people and was hiding the bodies in her home. When the officer arrived at the scene, he found "[h]er behavior . . . very erratic and very manic, she was very animated." She told him that he was a "clone" and "was there to kill her and the other police officers [at the scene] and her husband."

¶3 Dr. David Stoker, a psychiatrist at a Tucson mental health facility and screening agency, subsequently filed a petition for court-ordered evaluation of appellant

pursuant to A.R.S. § 36-523. The trial court granted the application and petition. Thereafter, Dr. Daniel Fredman filed a petition for court-ordered treatment pursuant to § 36-533, based on his own examination of appellant and that of Dr. Stoker.

¶4 Fredman testified during a two-day hearing that appellant was seriously mentally ill, "actively psychotic," "paranoid and delusional," and suffering from "schizophrenia, paranoid type, chronic." He stated appellant required a combination of inpatient and outpatient treatment for "up to a year." He added that appellant had refused to take her medication and had been forced to take it once. Consequently, her condition had not improved and she was not ready to be discharged.

¶5 Although Fredman believed appellant required a combination of inpatient and outpatient treatment, during cross-examination, he was asked whether he was "aware that [appellant] is not Title 19 eligible," and he replied he had heard that. When asked if he understood "the only services she would receive would be medications, and every three or four months seeing the doctor," he responded, "I don't know the details of it." On the second day of the hearing, Fredman was recalled to testify and stated he had learned since the first hearing that appellant was "not eligible as a Title 19 recipient for outpatient court ordered treatment" and questioned the wisdom of forcing her to take medication in the hospital if there were no outpatient plan, stressing the importance of an outpatient plan given appellant's history of refusing to take her medications. But when questioned by the court, he clarified that he still did not believe appellant was ready to be discharged, speculating she could be "stabilized" if she were to take her medication for

two weeks. And, he made it clear that he had not changed his opinion she was persistently or acutely disabled.

¶6 Stoker also testified at the hearing. He, too, diagnosed appellant as suffering from schizophrenia, which he characterized as a serious mental illness, and opined that she was persistently or acutely disabled. He recommended "combined inpatient outpatient . . . for case management services and medication monitoring."

¶7 After the hearing, the trial court found that clear and convincing evidence established appellant was suffering from a mental disorder and as a result, was persistently or acutely disabled and in need of mental health treatment. The court ordered her to receive "treatment for one year with the ability to be re-hospitalized, should the need arise, in a level one behavioral health facility for a time period not to exceed 180 days." The court reserved "jurisdiction to approve any proposed inpatient or outpatient treatment plan that extends to 365 days if that plan is presented to the Court for review and approval." Additionally, the court found, there was "no evidence that [appellant was] ready for discharge at this time and there is no outpatient treatment plan." The court expressly refused to order appellant to take the prescribed medication, finding the decision whether she should be forced to do so was for her treating physicians to make. The court gave the parties "leave to request a hearing to provide evidence as to discharge or outpatient treatment." Later that day, the court set the matter for a subsequent hearing "to review the file for an outpatient treatment plan or other pleadings regarding discharge."

¶8 Ten days later, appellant filed a motion for status hearing and reconsideration, asking the court to reconsider its order continuing appellant's hospitalization.[1] She argued, as she had at the hearing, that she was "not entitled to receive out-patient services, . . . and the agency will not be providing an out-patient treatment plan." "Therefore," she argued, "this Court has created a legal fiction in order to retain a patient in the hospital against medical advice . . . ." After a combined hearing on that motion and a discharge hearing about two weeks after the court's initial order, the court approved and signed an outpatient treatment plan, ordering that she be discharged from the hospital. Appellant concedes in her opening brief she was discharged after thirty-one days of hospitalization.

¶9 We review an order for involuntary treatment to determine if substantial evidence supports the order. *See In re MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). We will not disturb the trial court's ruling unless the factual findings upon which it is based are clearly erroneous or unsupported by substantial evidence. *See In re Maricopa County Mental Health No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995). The evidence supporting an order for involuntary treatment must be clear and convincing. A.R.S. § 36-540(A); *In re MH 2007-001236*, 220 Ariz. 160, ¶ 15, 204 P.3d 418, 423 (App. 2008). On appeal, we view the evidence in

[1]We note that appellant filed her notice of appeal on August 10, 2010, and the hearing was conducted on August 18, the court having retained jurisdiction to conduct that hearing. We have considered her motion and what took place following the hearing for the limited purpose of confirming appellant's assertion in her recitation of the facts that she was ultimately discharged from the hospital, a point that has rendered moot some of her claims.

the light most favorable to affirming the court's order. *MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d at 1163. Issues regarding the interpretation of statutes, however, are questions of law, which we review de novo. *Maricopa County No. MH 94-00592*, 182 Ariz. at 443, 897 P.2d at 745.

¶10 Appellant first contends the trial court's order violated § 36-540(A) by providing that she "not . . . be discharged without further hearing." Conceding the portions of the court's order prescribing the period of commitment and reserving jurisdiction to approve any proposed inpatient or outpatient treatment plan is consistent with the statute, she contends discharge decisions are for medical personnel to make, not courts, and that further discharge hearings are not among the options set forth in the statute. She also contends the order violated her "right to be treated in [the] least restrictive setting when it required [an] outpatient treatment plan before discharge when none was legally available."

¶11 Appellant's arguments insofar as they relate to her being hospitalized until there was a further discharge hearing and an outpatient treatment plan are "arguably moot." *Cf. In re MH-2008-000867*, 225 Ariz. 178, ¶ 1, 236 P.3d 405, 406 (2010) (finding case "arguably moot" because treatment order had expired). As we noted above and as appellant concedes, she was discharged from the hospital after the outpatient treatment plan was presented to, and approved by, the trial court. In particular, appellant's suggestion that the court's order resulted in an indefinite commitment solely because there was no outpatient treatment plan was plainly rendered moot by her discharge from the hospital less than two weeks after the court entered its order.

¶12 To the extent appellant is arguing the trial court's order is flawed and should be vacated in its entirety, that argument is without merit, even if not moot. The court did not, as appellant suggests, make decisions or retain the authority to make a decision that should be made by treating physicians. Rather, the court made clear it was well aware of its role versus that of mental health care providers. For example, the court refused to order appellant to take her medication, finding her treating physicians must decide whether she should be forced to take it. And the court made clear its decision not to discharge her was based on the evidence that established she was not ready to be discharged at that time, not the mere absence of an articulated outpatient plan.

¶13 Although there was speculation during the hearing appellant might not qualify for certain outpatient treatment programs, the trial court's comments at the end of the hearing reflect the court was not convinced an outpatient treatment plan could not be created; rather, the evidence simply had not been presented that one existed at that time. For that reason, the court directed the parties to present evidence at a subsequent hearing as to "what discharge plans may or may not be available for her." As the state correctly asserts, the court is required to consider the least restrictive alternative that is both available and appropriate. § 36-540(B). The court did just that. We fail to see how, based on the record before us, the court erred by ordering appellant committed and providing an opportunity for her physicians to come up with an appropriate outpatient treatment plan, which they did less than two weeks later. The court neither exceeded the scope of its authority nor abused its discretion.

¶14 Appellant also contends the trial court erred by denying her request on the first day of the hearing to dismiss the petition and release her from the hospital, on the ground that she had given her husband a mental health care power of attorney, pursuant to A.R.S. § 36-3281, which the doctors did not consider when she was initially hospitalized. Appellant had indeed given her husband the power of attorney in February 2010, shortly after the termination of a previous period of court-ordered treatment. Fredman testified at the hearing on the petition that he had been informed of the power of attorney but was "under the impression that . . . the petition process supersedes any power of attorney." Appellant's husband testified at the same August 2010 hearing that appellant had not been taking her medication since January of that year, but he did not believe she should be hospitalized for court-ordered treatment. His opinion was contradicted by that of Stoker and Fredman.

¶15 We agree with the state that the mental health care power of attorney simply gives the agent the authority to consent to treatment when the principal is incapable of giving that consent. § 36-3281(B), (D). The mental health care power of attorney applies to the situation in which the agent wishes to consent to a voluntary hospitalization and treatment of the patient or principal. *See* A.R.S. § 36-518(A). It can be overridden by an involuntary proceeding. *See* A.R.S. §§ 36-523, 36-524, 36-529(B), 36-533.

¶16 Nothing about the power of attorney granted by appellant to her husband prevents a proper party from commencing involuntary evaluation and treatment proceedings when the agent will not consent to the principal's commitment for treatment.

Additionally, as the trial court correctly observed, the power of attorney here did not include the authority to consent to appellant's hospitalization in a level one behavioral health care facility. *See* A.R.S. § 36-3283(F) (permitting agent to consent to principal's hospitalization in level one behavioral health facility if expressly provided in power of attorney); *see also* § 36-3281(B). Consequently, appellant's husband did not have the power to consent to appellant's commitment to a level one facility if necessary, which the evidence established she needed. For these reasons, the court therefore did not err when it refused to dismiss the proceeding.[2]

¶17 The trial court's order is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[2]To the extent appellant had argued below her rights were violated during her initial hospitalization because physicians had not considered the mental health care power of attorney, the proper means of obtaining relief would have been to seek relief immediately by petitioning for a writ of habeas corpus or an action pursuant to A.R.S. § 36-516, rather than to bring the matter to the trial court's attention as she did on the first day of the hearing on the petition for court-ordered treatment, requesting that the court dismiss the petition. *See In re MH 2008-002393*, 223 Ariz. 240, ¶ 14, 221 P.3d 1054, 1057 (App. 2009). And, as in that case, appellant would be entitled to relief on appeal only if the hearing itself had been unfair as a result of any illegality, which it was not. *See id*. ¶ 15.